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Supreme Court of the United States

OCTOBER TERM, 1939.

No. [redacted] 19[illegible]

HARRY BRIDGES,

Petitioner,

against

STATE OF CALIFORNIA.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE.

AMERICAN CIVIL LIBERTIES UNION
as Amicus Curiae.

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INDEX.

PAGES

Statement 1

POINT I—The conviction for contempt violated petitioner's rights of freedom of speech and of the press 2

CASES.

Craig v. Hecht, 263 U. S. 255 5

deJonge v. Oregon, 299 U. S. 353 ..... 3 (note)

Erie Railroad Company v. Tompkins, 304 U. S. 64 4

Grosjean v. American Press Co., 297 U. S. 233 ..... 3 (note)

Hague v. C. I. O., 307 U. S. 496 ..... 3 (note)
Herndon v. Lowry, 301 U. S. 342 4

The Leaflet Cases, 308 U. S. —— ..... 3 (note)
Lovell v. Griffin, 303 U. S. 444 ..... 3 (note)

Near v. Minnesota, 283 U. S. 697 ..... 3 (note)
Nixon v. The State, 207 Ind. 426 4

Patterson v. Colorado, 205 U. S. 454 4

Sinclair v. United States, 279 U. S. 749 5
State v. American News Company, 64 So. Dak. 385 4

The Times-Mirror Company v. The Superior Court of the State of California, 98 Cal. Dec. 108, 92 Pac. 2nd 1029 ..... 1, 3
Toledo Newspaper v. United States, 247 U. S. 402 5

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HARRY BRIDGES,

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BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE.

The American Civil Liberties Union submits this brief because it believes that the conviction for contempt here sought to be reviewed constitutes a serious threat to the freedom of speech and of the press. We believe that the questions in this case, as well as those in the case of *The Times-Mirror Company* v. *The Superior Court of the State of California*, 98 Cal. Dec. 108, 98 Pac. 2nd, 1029, which, we are informed, will shortly be presented here for review—, merit the fullest consideration by this Court.

The American Civil Liberties Union is an organization devoted to the protection of those rights guaranteed by state and national constitutions which are inherent in a democracy. Basic among such rights are freedom of speech and of the press. The American Civil Liberties Union recognizes, of course, that no rights are absolute, that their exercise may be subject to punishment under certain con-

ditions, and that a person may, in a proper case, be punished for contempt on account of comment on judicial proceedings. But, in determining whether or not a particular publication should be so punished, it must always be borne in mind that freedom of speech and of the press are rights not lightly to be taken away and that a policy of restriction may produce a press servile and subservient with consequences to our freedom that are incalculable. It is only in the clearest cases, therefore, that the Courts should use their power to punish for contempt.

This necessity for judicial self-restraint is all the greater because the Courts are, in contempt proceedings, sitting in judgment on issues affecting themselves. Here are absent those checks and balances so conspicuous in our system of government which permit review of both legislative and executive actions by a different department. In contempt matters, the judiciary constitute a law unto themselves. Excessive sensitiveness to criticism or arrogance of attitude tend far more to bring the judiciary into disrepute than do most of the comments which form the basis of contempt proceedings.

POINT I.

The conviction for contempt violated petitioner's rights of freedom of speech and of the press.

Petitioner has been convicted of contempt of Court for sending to the Secretary of Labor of the United States a telegram which characterized as "outrageous" a decision of a State Court in a controversy between two labor unions (see R. 50, 51). The judge, before whom the contempt proceedings were instituted, held that since an application for a new trial remained undetermined (R. 51), the action was still pending before the judge criticized and, therefore, the sending of the telegram and its subsequent publication were calculated to interfere with the administration of justice (R. 52).

The Supreme Court of the State of California affirmed this judgment in an opinion (R. 136-161) from which Judge Edmonds dissented (R. 161-176). The dissent was based upon the ground that the conviction violated petitioner's rights of freedom of speech and of the press. These views were reiterated by Judge Edmonds in his dissent in *The Times-Mirror* case. And in that case he was joined by Judge Gibson, who had not sat in the case at bar. Both of these dissents have been annexed to the petition for writ of certiorari herein.

In *The Times-Mirror* case the contempt proceedings were based on newspaper editorials. Two editorials approved verdicts of guilty in criminal cases; another criticized a law under which it was possible for a defendant found insane upon a charge of manslaughter to be released if found sane as of a later date, one of the editorials expressed the opinion that a judge should not grant an application for probation then pending before him.

We thus see that the California Courts have approved convictions of contempt both where judicial action has been criticized and where it has been approved. In no one of the cases was any act committed in the presence of the judge, nor did any of the judges involved indicate that their freedom of action has been impaired. In the cause at bar the proceeding was instituted by the Executive Secretary of the Los Angeles Bar Association (R. 1).

This Court, having in numerous recent cases,* voided legislation because of its interference with freedom of speech and of the press, it cannot be supposed that similar restrictions should not be applied to judicial acts. Surely, punishments for contempt must be scrutinized as much as legislation to determine whether or not the evil sought to be remedied by the punishment is so direct and serious in character as to justify a curtailment of the great privileges of free speech and press. The words of Mr. Justice Roberts in

*Near v. *Minnesota*, 283 U. S. 697; *Grosjean* v. *American Press Co.*, 297 U. S. 233; *deJonge* v. *Oregon*, 299 U. S. 353; *Lovell* v. *Griffin*, 303 U. S. 444; *Hague* v. *C. I. O.*, 307 U. S. 496; *The Leaflet Cases*, 308 U. S. ——.

Herndon v. *Lowry*, 301 U. S. 342, warning against the punishment of words because of their "dangerous tendency" are as applicable to the action of judges as to that of a legislature.

The Fourteenth Amendment is aimed at all state action, not merely at legislative or executive action alone. That judges are subject to the commands of the Constitution was recently dramatically exemplified in *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64. There this Court overthrew a century old practice of deciding cases in the Federal courts in disregard of state common law, pointing out that that course of conduct violated the Constitution.

There is no reason why prosecutions for contempt should not be subject to the same constitutional restrictions as govern prosecutions for crime. Indeed there is greater need because of the summary character of contempt proceedings. It should not, therefore, be enough for a Court to reach the conclusion that a criticism of judicial proceedings *might* obstruct justice. Rather should the Court be required to find that there was a reasonable apprehension that the independence of the judiciary was being challenged by the comment complained of. To preserve the nice balance between contending principles, freedom of the press and independence of the judiciary, it should be necessary to find a strong probability that interference would result from the act charged before punishment is meted out. Such a rule has been adopted in *State* v. *American News Company*, 64 So. Dak. 385, and *Nixon* v. *The State*, 207 Ind. 426.

This Court has not had occasion to decide the issues presented in the case at bar. The three decisions relied upon by the Court below (R. 156) do not support its position. The first of these, *Patterson* v. *Colorado*, 205 U. S. 454, was decided prior to the acceptance by this Court of the doctrine, now firmly established, that the federal Constitution protects against state interference with freedom of the press. Besides, Mr. Justice Holmes considered that that freedom primarily protected against attempts at prior restraints, whereas it is now well settled that it protects

equally against unwarranted attempts at subsequent punishment. It is the dissenting opinion of Mr. Justice Harlan in that case which more truly reflects the modern view of this Court than does the majority opinion, though written by Holmes—whose later views, indeed, amount to a repudiation of that earlier opinion.

In *Toledo Newspaper* v. *United States*, 247 U. S. 402, the lower Courts had found that the publication complained of was intended to provoke resistance to an injunction; moreover, the words were vituperative of the judge. Of the constitutional problem Chief Justice White said only that the right of the press was "subject to the restraints which separate right from wrong." That, of course, merely begs the real question.

Even on such a record Justice Holmes and Brandeis dissented. It is true that their dissent rested more on questions of statutory interpretation than on constitutional principles. Nevertheless, Mr. Justice Holmes pointed out that judges were expected to be men of "ordinary firmness of character" and that he could not believe that such a judge could have found anything in what was printed in that case which would have "even a tendency" to prevent his performing his duties. And these words are clearly applicable to the case at bar.

Finally, the California Court cited *Sinclair* v. *United States*, 279 U. S. 749. That case does not involve any issue of free speech. The act there charged was the attempted tampering with a juror. The only question which arose was whether or not the fact that the juror was unconscious of the attempt prevented the act from being a contempt. This Court, finding that the direct purpose was to obstruct the administration of justice, inevitably concluded that it was proper to charge the appellants in that case with contempt. The decision in the *Sinclair* case throws no light on the problem now before this Court.

Of much greater relevance to the problem here presented are the observations of some of the judges in *Craig* v. *Hecht*, 263 U. S. 255. That case was decided on a matter

of procedure but Chief Justice Taft indicated that a punishment for contempt was possible only when the publication "is *intended* and calculated to obstruct and embarrass the Court." And in that case Justices Holmes and Brandeis dissented because they could see no basis for a claim that the letter there involved constituted an obstruction of justice. Those judges were well aware of the need for not impairing the right of the people to comment on the actions of judges except when it is quite clear that the comment has a direct tendency to obstruct.

In contempt cases, therefore, the Courts must weigh in the balance one great social need against another: a free press and a free judiciary. Not lightly should that balance be cast. It will not do to assume that one freedom is superior to the other. The freedom of judges may be restricted if they improperly interfere with the press; the freedom of individuals or of newspapers may be limited if they improperly interfere with the Courts. But the problem cannot be solved by the application of any precise formula of words. Much will depend on the temper of the comment under scrutiny and the setting in which it was uttered. Except in unusual circumstances criticism of a decision should never be punishable as contempt, even if it suggests to the judge what decision the writer would prefer.

CONCLUSION.

It is respectfully submitted that the questions presented in this case are of sufficient importance to justify the granting of the petition for certiorari.

Respectfully submitted.

AMERICAN CIVIL LIBERTIES UNION
as Amicus Curiae.

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